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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 274.

THE UNITED STATES, APPELLANT,

vs.

CHARLES A. GARTER.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 11, 1896.

(16450.)

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SUPREME COURT OF THE UNITED STATES.

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1 In the Court of Claims.

CHARLES A. GARTER
vs.
THE UNITED STATES. } No. 18266.

I.—*Communication of Secretary of the Treasury referring claim, filed February 16, 1896.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 15, 1894.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Pursuant to the provisions of section 1063 of the Revised Statutes of the United States, I have the honor to refer to your honorable court for adjudication the claim of Charles A. Garter, United States attorney for the northern district of California, for professional services rendered as attorney and special counsel for the United States in the case entitled The United States, appellant, vs. Munson Curtiss Hillyer et al., appellees, on appeal to the United States circuit court of appeals for the 9th circuit, the amount claimed being $450.00, which was approved for $300.00 by the Attorney-General.

The claim is referred at the request of the First Comptroller of the Treasury, who certifies that it involves controverted questions of law, and that the decision will affect a class of cases and will furnish a precedent for future action in the adjustment of a class of cases.

All the papers in the case enclosed by the First Comptroller in his letter of the 12th instant are herewith transmitted.

Respectfully, yours,

W. E. CURTIS,
Acting Secretary.

2 CHARLES A. GARTER
vs.
THE UNITED STATES. } No. 18266.

II.—*Petition, filed February 8, 1896.*

To the Honorable the Court of Claims:

Your petitioner, Charles A. Garter, a citizen of the United States, a resident of San Francisco, in the State of California, respectfully represents:

That he was United States district attorney for the northern district of California from the sixth day of November, A. D. 1890, to the 13th day of December, A. D. 1894. That during such period he rendered professional services as special counsel for the United States in a case entitled, United States, appellant, vs. Munson Curtis Hillyer et al., appellees, on appeal to the United States circuit court of appeals from the district of Alaska, upon the written request of the Attorney-General of the United States.

The said suit was originally instituted in the district court of Alaska by the United States to recover against said Hillyer, as United States marshal, and his sureties, $3,941.89 and interest thereon from the 30th day of June, 1885, claimed as due from the said Hillyear on his account

as marshal. Judgment was rendered against Hillyer and certain of the defendants for $2,290.16, with interest at the rate of 6% from
3 March 8, 1892. A motion for a new trial on the part of the United States denied. An application for a writ of error to circuit court of appeals for 9th district was made by the United States and allowed. The writ of error and transcript of record were filed in said circuit court of appeals, 9th district, on the 18th day of August, 1892.

The case did not arise in the district of petitioner and was not prosecuted there except to this extent, that the northern district of California is a part of the district included within the jurisdiction of the 9th circuit court of appeals, holding session in San Francisco.

The preparation and argument of cases on appeal from the district court of Alaska constituted no part of claimant's official duty as United States district attorney for the northern district of California.

Petitioner rendered his service in accordance with the request of the Attorney-General in the preparation and argument of said case in said circuit court of appeals.

The points involved in the trial of said case were important, involving (inter alia) the interpretation of the act of Congress providing for the civil government of Alaska, known as the Administrative Act. The transcript was large, and required thorough examination of long and intricate accounts. The brief prepared by petitioner was submitted to the Attorney-General and First Comptroller of the Treasury. Judgment of reversal was rendered by the circuit court of appeals and the position taken in behalf of the United States sustained.

4 Petitioner says that he presented his account for professional services in the sum of $450 to the circuit court of the northern district of California on the 19th day of December, 1893, when the account was approved for professional services actually and necessarily performed and the charges were declared just and reasonable; the said account so approved was forwarded to the accounting officers of the Treasury, and his right to compensation not yet determined.

Petitioner further says that his said account was approved by the Attorney-General in the sum of three hundred dollars ($300).

This case has been referred to the Court of Claims by the Secretary of the Treasury as involving controverted questions of law, under the provisions of sec. 1063, R. S.

Petitioner further says there is justly and legally due him from the United States, for services aforesaid, the sum of four hundred and fifty dollars ($450), for which amount he asks for judgment.

Petitioner is the sole owner of this claim and the only person interested therein. No assignment or transfer of any part or portion thereof has been made, nor has any part or portion been paid.

CHARLES A. GARTER.

SAN FRANCISCO, *State of California*, ss.:

Charles A. Garter, being duly sworn, deposes and says that he is the claimant in the above-stated case, and that the facts stated in above petition are true to the best of his knowledge and belief.

Subscribed and sworn before me this 9th day of January, A. D. 1896.

E. M. MORGAN, *Notary Public.*

5 III.—*Traverse, filed May 11, 1896.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegience to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

6 IX.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, on the evidence, makes the following

FINDINGS OF FACT:

I.

The claimant, Charles A. Garter, is a citizen of the United States.

From November 6, 1890, to December 13, 1894, he was the United States district attorney for the northern district of California.

II.

While district attorney, as aforesaid, he was employed by the Attorney-General as special counsel for the United States in the case of the United States, appellants, v. Munson Curtis Hillyer and others, appellees (being a suit on the bond of a United States marshal and his sureties), on appeal taken by the United States to the circuit court of appeals for the ninth circuit from a judgment rendered by the district court for the district of Alaska.

The only instruction given by the Attorney-General to claimant to act for defendants was the following correspondence:

SAN FRANCISCO, *June 30, 1891.*

ATTORNEY-GENERAL,
Washington, D. C.

SIR: I have the honor to inform you that the organization of our new circuit court of appeals was completed on the 22nd inst., with Justice Field, of the United States Supreme Court, Judge Sawyer, of our circuit court, and Judge Deady, of the Oregon district court, sitting as justices. Ex-United States Marshal J. C. Franks is the marshal; Frank B. Monckton, former deputy clerk of our circuit court, was appointed clerk. The rules prepared by the United States Supreme Court were adopted. An adjournment was had until the 25th inst., at which time a rule was adopted relative to the admission of attorneys, and thereupon the court adjourned

until the 1st Monday of October, thereafter to continue in session at San Francisco until the further order of the court.

I respectfully call your attention to the fact that the act of March 3, 1891, 27 Statutes at Large, 826, makes no provision or mention of any law officer to attend to the business on behalf of the Government in this court. Is it your intention to assign the district attorney of each district to attend to the cases arising in his district? It is quite probable that, so far as this circuit is concerned, the new court will hold its sessions in San Francisco for some time. In that event what provision will be made for attorneys for the Government? I respectfully request that I may be assigned to such business of this character as you may desire to entrust to my care, the compensation to be fixed by allowance of court and your own action, as is usual in cases where you assign or appoint counsel in Government matters.

Very respectfully,

CHAS. A. GARTER,
U. S. Attorney.

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JULY 9, 1891.

CHARLES A. GARTER, Esq.,
U. S. Attorney, San Francisco, Cal.

SIR: Yours of June 30th, advising me of the organization of the circuit court of appeals, is received. In response to the inquiry in your letter, I have to say that when cases are taken into that court in which the Government is interested as a party the district attorney will be expected to appear and protect the interests of the Government—certainly until Congress shall make other provisions. For such services, not provided for by law at present, compensation will have to be made, but will probably have to await an appropriation by Congress for that purpose.

Yours, truly,

W. H. H. MILLER,
Attorney-General.

(J. R.)

The argument of the case was made by the claimant before said court of appeals while in session in San Francisco and within the territorial lines of the northern judicial district of California.

III.

In the preparation for the argument before the circuit court of appeals an examination of the act of Congress providing for the civil government of Alaska was involved; also the examination of the accounts of the United States marshal of Alaska, the preparation of brief of authorities and presentation to the circuit court of appeals. Judgment of reversal of the district court of Alaska was rendered by the circuit court.

IV.

The claimant presented to the circuit court for the northern district of California, verified by his oath, an account for services rendered in

accordance with the request of the Attorney-General, in the sum of $450, which sum was approved by the court as a just and reasonable allowance for the services so rendered by the claimant, and the same was certified to by the judge of the circuit court for said district.

The Attorney-General approved the account for the sum of $300, and forwarded the claim to the accounting officers of the Treasury Department for adjustment.

In the calendar year of 1892 claimant was paid the maximum compensation allowed by law to a district attorney.

8 V.

Said claim was referred to the court by the following communication:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., February 15, 1894.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Pursuant to the provisions of section 1063 of the Revised Statutes of the United States, I have the honor to refer to your honorable court for adjudication the claim of Charles A. Garter, United States attorney for the northern district of California, for professional services rendered as attorney and special counsel for the United States in the case entitled The United States, appellant, v. Munson Curtis Hillyer et al., appellees, on appeal to the United States circuit court of appeals for the ninth circuit, the amount claimed being $450, which was approved for $300 by the Attorney-General.

The claim is referred at the request of the First Comptroller of the Treasury, who certifies that it involves controverted questions of law, and that the decision will affect a class of cases, and will furnish a precedent for future action in the adjustment of a class of cases.

All the papers in the case inclosed by the First Comptroller in his letter of the 12th instant are herewith transmitted.

Respectfully, yours,

W. E. CURTIS,
Acting Secretary.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant recover from the defendants the sum of $300, which shall not be included in any emolument account heretofore earned by claimant as a district attorney.

V.—*Opinion of the court.*

PEELLE, J., delivered the opinion of the court:

The claimant seeks to recover for professional services rendered as special counsel, at the request and employment of the Attorney-General of the United States, in a cause on appeal to the circuit court of appeals for the ninth circuit from a judgment rendered by the district court for the district of Alaska whilst the claimant was at the same time the

United States district attorney for the northern district of California, within the territorial limits of which the circuit court of appeals was sitting.

For the services thus rendered the claimant presented an account for $450 to the circuit judge for said northern district, who approved the same as a just and reasonable allowance.

The account so approved was then presented to the Attorney-General, who approved the same for the sum of $300 and forwarded the claim to the accounting officers of the Treasury Department for adjustment.

The claim was transmitted to the court by the Secretary of the Treasury, at the request of the First Comptroller of the Treasury, under the provisions of Revised Statutes, section 1063, as set forth in Finding V, as involving controverted questions of law, etc.

The question presented is as to the power and authority of the Attorney-General of the United States to employ the claimant a district attorney as special counsel to represent the United States in a cause in which they are parties, on appeal from a judgment rendered by the district court for the district of Alaska to the circuit court of appeals sitting in San Francisco, within the territorial limits of the district in which the claimant's official duties were required to be performed.

9 If the services for which the claimant seeks to recover were performed by him as district attorney, or if the services came within his official duties, he can not recover, although performed at the request and employment of the Attorney-General of the United States, as under Revised Statutes, section 771, it is made "the duty of every district attorney to prosecute in his district * * * all civil actions in which the United States are concerned."

And by Revised Statutes, section 1765, they are prohibited from receiving "any additional pay, extra allowance, or compensation in any form whatever for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

That section was construed by the Supreme Court in the case of Hoyt v. United States (10 How., 109, 141) most rigidly against the right of a district attorney to recover extra pay or allowance for services performed as such.

As if that section were not comprehensive enough, Congress, by the act June 20, 1874 (1 Supp. to R. S., 2d ed., p. 18), provided—

"That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: Provided, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

The defendants contend, and we think rightly, that the only compensation to which a district attorney may be entitled by way of salary and fees, certainly in the preparation and trial of causes, is covered by Revised Statutes, sections 770, 823, 824, 825, and 827.

Section 824 provides for specific fees for specific service, while for analogous service in cases "where the United States is interested, but is not a party of record," Revised Statutes, section 299, authorizes the allowance of assimilated fees.

The salary of $200 a year given by section 770 was evidently intended by Congress to cover such incidental services as are not provided for by specific or analogous fees, such as those which may be required of them by the Attorney-General under Revised Statutes, section 355, in respect to the title to real estate.

It does not follow, however, that a district attorney may not be required to perform services in behalf of the United States for which no compensation is provided.

The rule on this subject was stated in the case of United States v. King (147 U. S., 676, 679):

"The ordinary rule, in the absence of legislation, is that if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation; but if he is employed to render services in an independent employment, not incidental to his official duties, he may recover for such services." (Mechem on Public Officers, secs. 862, 863.)

If, therefore, the services performed by the claimant in the circuit court of appeals were germane to his office, he can not recover, though no compensation is provided therefor; but if he rendered "service in an independent employment, not incidental to his official duties, he may recover for such services."

10 The services performed by the claimant in the circuit court of appeals were apparently germane to his office, as they were performed within the territorial limits of his district, and, too, in a cause in which the United States were parties, but such services do not appear to have come within his official duties, for the reason that the cause originated and was prosecuted to final judgment in the district court for the district of Alaska, from which the appeal was taken.

So that if the services performed by the claimant in that cause in the circuit court of appeals came within his official duties, it is evidently because the court of appeals was at the time sitting in San Francisco, within the territorial limits of the district wherein the claimant was required to perform his official duties.

To so hold might impose upon a single district attorney in each judicial circuit the hardship of appearing in the court of appeals in every cause coming up on appeal from the various districts within the judicial circuit wherein the United States were interested.

This we do not believe Congress contemplated when the circuit courts of appeals were created.

If it is not the recognized practice for district attorneys to follow their respective cases into the circuit court of appeals within their respective judicial circuits, we are inclined to the opinion that, in the interest of the United States, it is within the scope and power of the Attorney-General to establish such practice by requiring district attorneys to do so.

In the Perry Case (28 C. Cls. R., 483, 491) the court, in speaking of the power of the Attorney-General under Revised Statutes, sections 355

to 366, in respect to the litigation and law business in which the United States are interested, said:

"These provisions are too comprehensive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney-General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys in the public service. The claimant could not have been employed to perform professional services in matters within the duties of the district attorney over which the Attorney-General had supervision and control, except as provided in Revised Statutes, sections 363 and 365, ante."

And in the same connection the Supreme Court, in the case of the United States v. Smith (158 U. S., 346, 356), said:

"It is essential to the interests of the Government that in all suits, criminal and civil, in which it is interested, the Attorney-General shall be at liberty to call upon the district attorney to represent it, and his compensation therefor, whether measured by the fee bill or not, is a part of the fees and emoluments of his office."

The Act of March 3, 1891 (1 Supp. R. S., p. 901), creating the circuit courts of appeals, makes no express provision for fees or other compensation to district attorneys in said court in cases where the United States are parties or otherwise, nor is there any provision in the act requiring district attorneys or any other officer of the United States to appear in said court as counsel in the interest of the United States.

The authority and requirements for such services in the circuit courts of appeals, as well as compensation therefor, must be found in other statutes, which were enacted long prior to the date of the act creating the circuit courts of appeals.

11 The second section of the act provides for the appointment of a marshal and clerk, whose duties shall be the same as those of the marshal and clerk of the Supreme Court "so far as may be applicable," while the same section provides that "the costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court."

By the last paragraph of section 9 of said act it is provided—

"That the marshals, criers, clerks and bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts."

By Revised Statutes, section 359, et seq., it is made the duty of the Attorney-General and the Solicitor-General, "except when the Attorney-General in particular cases otherwise directs," to "conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court

of the United States in which the United States is interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so," or the Attorney-General "shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings," as provided under Revised Statutes, section 363.

By Revised Statutes, section 362, it is made his duty to exercise general superintendence and direction over district attorneys as to the manner of discharging their respective duties, while under Revised Statutes, section 368, he is given general supervision over their accounts. So that we think it is within the scope and authority of the Attorney-General to direct district attorneys to follow cases on appeal from their respective districts into the circuit court of appeals within their respective judicial circuits, and he may, "whenever in his opinion the public interest requires it, employ and retain, in the name of the United States," special counsel "to assist the district attorneys in the discharge of their duties."

For this purpose, where the official duties of a district attorney are not thereby interfered with, of which the Attorney-General is presumed to know, and where the case in which he is employed was one taken on appeal from a district other than the one in which his official duties were required to be performed, as in the case at bar, we see no objection to the employment by the Attorney-General, as special counsel therefor, of one who was at the time a district attorney within the district in which the court of appeals was sitting.

Then, again, in the appropriation act October 2, 1888 (25 Stat. L., 505, 545), there is placed under the control of the Attorney-General an appropriation of $5,000, with which to pay district attorneys such
12 special compensation as he may fix for services performed by them "not covered by salary or fees," and this amount has been appropriated for the same purpose each year since.

But in this case the claimant does not seek to recover for services performed by him as district attorney, but for services performed as special counsel or assistant to the district attorney at the request and employment of the Attorney-General.

If he performed the service as district attorney, and such service is "not covered by salary or fees," then the Attorney-General, under the appropriation act just cited, would be authorized to allow him special compensation therefor; but, under the decision in the Smith Case (supra), such compensation would be a "part of the fees and emoluments of his office."

If the management of the cause in the circuit court of appeals came within the official duties of the district attorney for the district of Alaska, and he for any reason did not follow the case into the court of appeals, or if he did so follow the case, we think it was within the scope and authority of the Attorney-General, under Revised Statutes, sections 363, 366, if in his opinion the public interests required it, to employ such attorney

and counselor at law as he thought necessary to assist such district attorney, stipulating with such special counsel or assistant attorney his compensation therefor.

Whatever fees may accrue to a district attorney for services performed in the court of appeals we think would belong to the district attorney of the district in which the case originated; or if no fees or other compensation are provided for to district attorneys for services performed in the court of appeals, it would be more reasonable for the district attorney who receives the benefits of the fees in the court below to follow such case into the court of appeals. He would certainly be entitled to mileage under the ninth clause of section 824. And in the case tried it may be that under Revised Statutes, section 826, no fees accrued, as the suit was on a bond.

Where one performs services, as in the case at bar, at the request and employment of the Attorney-General, who is authorized to so employ, and such services are accepted by the Attorney-General in behalf of the United States, and compensation therefor is fixed by him as was done in this case, the court will presume, in the absence of any showing to the contrary, that the intermediate requirements of the statute have been complied with.

We are of the opinion that the allowance of $300 by the Attorney-General, who was authorized to stipulate therefor, fixes the amount of the claimant's recovery in this case, and judgment will be entered in his favor accordingly.

13 VI.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 15th day of June, A. D., 1896, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said claimant, Charles A. Garter, do have and recover of and from the United States the sum of three hundred dollars, which shall not be included in any emolument account heretofore earned by claimant as a district attorney.

BY THE COURT.

(J. R.)

14 VII.—*Application for and allowance of appeal.*

CHARLES A. GARTER }
vs. } No. 18266.
THE UNITED STATES. }

From the judgment rendered in the above-entitled cause on the 15th day of June, 1896, in favor of the claimant, the defendants by their attorney-general, on the 5th day of August, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Assistant Att'y-General.

Filed August 5, 1896.

At a Court of Claims held in the city of Washington on the 12th day of November, 1896, on motion of Assistant Attorney-General Dodge, the application for appeal filed herein August 5th, 1896, by the defendants, was allowed.

BY THE COURT.

In the Court of Claims.

CHARLES A. GARTER
vs.
THE UNITED STATES. } No. 18266.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 17th day of November, 1896.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsed on cover:) Case No. 16450. Term No., 274. The United States, appellant, vs. Charles A. Garter. Court of Claims. Filed Dec. 11, 1896.

Nos 669, 670 & 671.
Motion papers for Appt.
Filed Dec. 21, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES v. HERRON. } No. 669.

THE UNITED STATES v. MILCHRIST. } No. 670.

THE UNITED STATES v. GARTER. } No. 671.

APPELLANT'S MOTION TO ADVANCE.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES
v.
HERRON. } No. 669.

THE UNITED STATES
v.
MILCHRIST. } No. 670.

THE UNITED STATES
v.
GARTER. } No. 671.

APPELLANT'S MOTION TO ADVANCE.

Now comes the appellant, the United States, and moves the court that the foregoing appeals may be advanced upon the docket for early argument as one case.

The appellant states, as reasons for said motion, that said cases present three phases of allowances to United States district attorneys of special compensation for services, held by the Court of Claims not to be covered by their salaries or fees, and decisions as to whether or not certain of such allowances are to be included in the maximum compensation allowed district attorneys by law.

An authoritative decision of these questions is of pressing importance to the conduct of public business. Considerable numbers of accounts involving these and similar questions are awaiting action by the accounting officers, and the cases here presented were referred to the Court of Claims by the Secretary of the Treasury under section 1063, Revised Statutes, in order to procure a judicial decision which might serve as a guide in the disposition of such various accounts. The various trial courts, including the Court of Claims, have held differently on the questions involved, so that there is now no settled rule of law on the subject.

One of the important questions involved is whether or not it was the legal duty of a district attorney to represent the United States in the circuit court of appeals as a part of his official duty; and if so, whether that duty belonged to the district attorney in whose district the case originated or to the district attorney in whose district the circuit court of appeals sat. Upon this question is dependent the action of the Attorney-General in making allowances of special compensation to numerous district attorneys for such services. It is important that such allowances should be made by the Attorney-General, who has been familiar with the work performed, rather than be left to the judgment of a successor without personal knowledge on that subject.

HOLMES CONRAD,
Solicitor-General.

No. 274.

Brief of Atty. Gen. (Trust) for Appt.

Filed Oct. 19, 1897.

FILED
OCT 19 1897
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

October Term, 1897.

THE UNITED STATES, APPELLANT,
v.
CHARLES A. CARTER, APPELLEE.
No. 274.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT, v. CHARLES A. GARTER, APPELLEE. } No. 274.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

The facts of this case as found by the court below are briefly as follows:

Appellee was from November 6, 1890, to December 13, 1894, United States district attorney for the northern district of California. While such district attorney he was directed by the Attorney-General to appear for and represent *The United States, appellants,* v. *Munson Curtis Hillyer et al., appellees,* on an appeal taken by the United States to the circuit court of appeals for the ninth circuit from a judgment rendered by the district court for the district of Alaska, and in pursuance of said direction appellee prepared and argued said case before said court

of appeals sitting at San Francisco, within the territorial lines of the northern district of California.

Appellee presented his duly certified account for these services for the sum of $450, which was allowed by the Attorney-General in the sum of $300 and sent to the Comptroller of the Treasury, who referred it to the Court of Claims, under the provisions of section 1063, Revised Statutes.

ASSIGNMENT OF ERRORS.

I.

The court erred in finding that, while district attorney for the United States for the northern district of California, the said appellee, Charles A. Garter, was employed by the Attorney-General as special counsel for the United States in the Case of *The United States, appellants,* v. *Munson Curtis Hillyer et al., appellees,* as set forth in Finding II.

II.

The court erred in finding as a conclusion of law that said appellee recover from these appellants the sum of $300 for his services rendered in said case, which should not be included in any emolument account theretofore earned by appellee as a district attorney.

III.

The court erred in rendering judgment in favor of said appellee and against these appellants for said sum, which should not be included in any emolument account as aforesaid.

ARGUMENT.

The difficulty in this case arises from the act of March 3, 1891 (26 Stat. L., 826), creating the circuit courts of appeals. This act provides clerks and marshals for said courts, but is silent upon the subject of law officers for the United States therein.

The court can not, we think, entertain the presumption that it was the intention of the act to leave the Government without law officers in these courts, and should look to preceding legislation for a solution of the difficulty. We shall therefore contend that it is the duty of the district attorney for the district in which the court of appeals shall be sitting (as in this case) to appear for the United States in all cases in which they may be directly or indirectly interested, whether the fee bill in force at the time this service was performed provided a compensating fee therefor or not.

Section 771, Revised Statutes, is as follows:

> It shall be the duty of every district attorney to prosecute in his district * * * all civil actions in which the United States are concerned.

It will be observed that this section does not refer to any particular court, but is broad enough to cover all the courts in his district, State or Federal. It can not be contended that there was no fee provided for such services as these, and it was not therefore the duty of the district attorney to perform them. The *duties* of a district attorney are one thing and his *compensation* quite another thing. Of course, the fee bill was drawn so as to make the fees relate in some measure to the duties

performed, but it by no means follows that an injunction to perform a duty was void unless accompanied by provision for a compensating fee.

Section 355, Revised Statutes, provides that district attorneys shall perform certain duties in relation to the titles of the public property within their respective districts, but the fee bill had no provision which, by the most liberal construction, allowed them any compensating fee. It was for compensation for services for which no fee was provided that salaries were allowed these officers.

It therefore seems plain that it was the duty of this district attorney to perform these services whether there was a compensating fee provided for them or not, and that a neglect to perform them would have been a gross breach of official duty. If it was his duty, it seems to us that it inevitably follows that he must look to the statutes and not to the discretion of the Attorney-General for his compensation.

Whether he was entitled to any fee in this case under the statutes is not clear. We do not think he could claim assimilated fees under section 299, Revised Statutes, because in this case the United States was a party of record, and that section expressly provides for cases where the United States is not a party of record. We do not think he could by analogy charge the fee allowed by section 824, Revised Statutes, for appeals from the district to the circuit court, because these are specific fees for specific acts. There is no room for analogy. Before the fee is earned the act described in the statute must be shown to have been performed. An appeal from the district court

to the circuit court can not by any reasonable construction be held to be the same thing as an appeal from the district court to the circuit court of appeals.

These services seem to conform in every respect, so far as mere words are concerned, to those for which a fee of $10 was provided, and which are described in section 824, Revised Statutes, in these words:

> In cases at law when judgment is rendered without a jury.

The only objection, so far as we can see, to holding that the services in this case fall within this provision is that the age of the statute and the reference to a jury show that Congress could not have had the circuit court of appeals in actual contemplation when the fee was fixed. But is this an objection to the construction? Congress did not have in contemplation at the time the fee bill was fixed, the attorney for many of the districts, for it was enacted before many of them were formed, nor did it have in contemplation many of the laws of which they were to secure the execution, but it can not be held that these were not subject to or provided for by the fee bill.

Or, if this be not correct, he earned whatever fee would have been taxed in the Supreme Court under that clause of the second section of the act of March 3, 1891, which says:

> The costs and fees of the Supreme Court now provided for by law shall be the costs and fees in the circuit courts of appeals.

It seems clear, then, that this service, being performed in his own district, was a part of the duty of this district attorney. It certainly was not the duty of the attorney of any other district, even though the case was appealed from his district.

If it was the duty of the Attorney-General and his various assistants, then under what statute was this district attorney employed? Certainly not under Revised Statutes, section 363, which authorizes the Attorney-General to employ and retain such attorneys and counselors at law as he may think necessary *to assist the district attorneys* in the discharge of their duties, since the case occurred in his own district and he could not be employed to assist himself; nor was he retained under section 366, since he received from the head of the Department of Justice no commission as a special assistant to the Attorney-General or to some of the district attorneys, as therein required; nor under section 367, because he was not sent out of his State or district, as may be contemplated by that section, and was not an officer of the Department of Justice.

And, further, section 365, Revised Statutes, prohibits the payment of compensation for special legal services unless the Attorney-General certifies that the service could not be performed by the Attorney-General, Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

That certificate the Attorney-General did not make in this case, and could not make, because the services were in fact performed by the district attorney, and that, too, within his own district.

In *United States* v. *Smith* (158 U. S. R., 346), when Smith, a district attorney in New Mexico, was ordered by the Attorney-General to appear for the United States in certain cases in the Territorial courts in his district in which the United States was interested and for which he claimed compensation other than fees, this court says (p. 355):

> It is true there is a provision in section 363 that the Attorney-General shall, whenever the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistants, attorneys, and counsel the amount of compensation, but this evidently does not contemplate that the district attorney himself shall be so employed.

We think there would be no difficulty in reaching the conclusion that it is the duty of a district attorney to perform every character of legal service which the interests of the Government may require in his district, and that when he was not compensated for it by a statutory fee he was by his salary, but for one statute which recognizes compensation other than fees and salary.

In the appropriation bill for the fiscal year ending June 30, 1889, (25 Stat. L., 542), was an appropriation of $85,000 "for payment of district attorneys, the same being for payment of such special compensation for services not covered by the salary or fees." This appropriation has been repeated each year since. Up to the making of this appropriation there was absolutely no provision for extra

compensation of district attorneys, and they were supposed to be fully compensated by their salaries and fees.

From the foundation of the Government the law officers of the United States have been the Attorney-General and his various assistants and the district attorneys and their assistants. For a hundred years it was the duty of one of these officers to perform every service of a legal character which was necessary to protect the interests of the United States. This must be true, because we can not suppose that the Government allowed any of its interests to go unprotected for so long a time. If the service was the duty of the district attorney, he was compensated for it by his salary and fees; if it was not his duty, it was the duty of some other law officer of the Government, who was paid to perform it, and the district attorney could not be lawfully employed upon it. (Sec. 365, Rev. Stat.)

It may be insisted, however, that to hold that every necessary legal service in his district is the duty of a district attorney, and that he is compensated by his salary and fees, would be to hold that the appropriation act had no effect whatever, and that it is the duty of the court to give it some effect if possible. We consider that the court should adopt a construction which will give the act some effect, if it can, and we do not think it positively follows that the construction we have suggested renders the act without effect. A district attorney may render valuable services to the Government which are not strictly of a legal character, or he may, under some circumstances, render services outside of his district

which would be "services not covered by the salary or fees."

But whatever construction the court may give the appropriation act, we do not think it should hold that the appearance of a district attorney, in a case to which the United States is a party, in a court in his own district, is anything but his simple duty or that the statute failed to provide compensation for it.

Whatever Congress meant by that appropriation act, the smallness of the appropriation negatives the idea that it could have intended to compensate for this character of service, nor could the circuit court of appeals have been in actual contemplation, for this appropriation was first made October 2, 1888 (25 Stat. L., 505), and the act establishing the circuit court of appeals was not passed till March 3, 1891 (1 Supp. R. S., p. 909).

LOUIS A. PRADT,
Assistant Attorney-General.

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No. 274.

Brief of Dudley, Michener & Dewees for Appellee

Filed April 25, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant.

vs.

CHARLES A. GARTER.

No. 274.

Appeal From the Court of Claims.

BRIEF OF APPELLEE.

W. W. DUDLEY,
L. T. MICHENER,
F. T. DEWEES,
Attorneys for Appellee.

N. T. ELLIOTT, PR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,
vs.
CHARLES A. GARTER.
No. 274.

Appeal from the Court of Claims.

Counter Statement.

The facts in this case are briefly stated in the Findings of Fact by the Court of Claims. (Trans. 3 to 5 inc.)

Charles A. Garter, whilst United States District Attorney for the Northern District of California, was employed by the Attorney-General as *special counsel* in a case on appeal from a judgment rendered by the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit then in session at San Francisco, California.

The Attorney-General agreed that he was to be compensated for his service.

His claim for service was approved by the Circuit Court of Appeals in the sum of $450. The Attorney-General fixed the amount at $300.

During the year 1893 Claimant was paid the maximum compensation allowed by law as District Attorney.

The claim was referred by the Secretary of the Treasury to the Court of Claims under the provisions of 1063 R. S.

San Francisco is situated within the Territorial limits of the Northern District of California.

Argument.

The services rendered by Appellee were not *germane* to his duties as District Attorney for the Northern District of California.

Sec. 771 R. S., as applicable to duties of district attorneys, is as follows:

"It shall be the duty of every district attorney to prosecute in *his* district * * * all civil actions in which the United States are concerned."

Certain specific duties are added: for example, title to lands purchased by the United States (355 R. S.), National Banks (380 R. S.) and prize cases.

His duties as district attorney are confined to his district and by necessary implication to Courts within "his district" in which he is the law officer.

The district of the Circuit Court of Appeals for the 9th Circuit is not in any respect "his district," beyond the fact that sessions of that Court may be held at San Francisco, not by reason of its being within the geographical limits of the northern district of California, but because that city is within the geographical limits of the 9th Circuit.

The services rendered were in a case arising in Alaska. The hearing at San Francisco was only because the Circuit Court of Appeals happened to be in session in San Francisco at the time. That Court would have had equal jurisdiction of the subject-matter in any other locality in which it was authorized to hold its sessions.

The service rendered was therefore not germane to Appellee's duties as district attorney for the Northern District of California.

It would seem to follow that, if the performance of services for which compensation is claimed is not germane to Appellee's office of district attorney, the appointment for the performance of such services whether to a district attorney or not would be the appointment of a special attorney. The fees of such special attorney would not be regulated by the fee bill, but by the amount approved by the Attorney-General.

It is admitted by Appellant that the services rendered in this case are neither covered by the fee bill nor can they be assimilated. The point made being that as the services were rendered within the territorial lines of his district they were merely extra services.

If it were true that these services were merely extra services within Appellee's district, which is controverted, they were special services for which compensation should be allowed.

The rule that independent employment in service not incident to official duties should be compensated is decided in *United States vs. King* (147 U. S. R., 676,679).

In *Perry's case* (28 C. Cls., 483, 491) and *Milchrist case* (31 C. Cls., 403) the authority of the Attorney-General to appoint district attorneys as special attorneys is reviewed with special reference to Secs. 770, 823, 824, 825 and 827 R. S.

In *Smith's case* (159 U. S., 346, 356), this Court said:

> "It is essential to the interests of this Government that in all suits criminal and civil, in which it is interested, the Attorney-General shall be at liberty to call upon the district attorney to represent it."

That service not covered by the fee bill or assimilated thereto may be paid for on the approval of the Attorney-General would seem to be beyond question. *Perry's case, supra; King's case, supra; Act of June* 20, 1874 (Supp. R. S. p. 18); *Act of October* 2, 1888 (25 S. L., 541), repeated every year thereafter.

On the question of maximum compensation, which is vital in this case, the Court is referred to the opinion in the Court below.

If the duties performed were not, as above claimed germane to Appellee's office of district attorney; if they did not arise and were not performed in his district, but in the district of the 9th Circuit; if he was an assistant to the district attorney of Alaska, he was in fact a special attorney duly appointed by the Attorney-General in an independent employment, the compensation for which bears no relation to his duties as district attorney for the Northern district of California. In such case the amount of compensation is fixed by the Attorney-General.

W. W. Dudley,
L. T. Michener,
F. P. Dewees,
Attorneys for Appellee.

UNITED STATES *v.* GARTER.

APPEAL FROM THE COURT OF CLAIMS.

Submitted April 14, 1898. — Decided May 9, 1898.

It is not part of the official duties of the District Attorney of the district, in which, at the time, a session of the Court of Appeals is held, to assume the management and control of the government cases in that court.

THE case is stated in the opinion.

Mr. Assistant Attorney General Pradt for appellants.

Mr. W. W. Dudley, *Mr. L. T. Michener* and *Mr. F. T. Dewees* for appellee.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

This case, like the two preceding, is one brought by a district attorney to recover for services rendered in a Court of Appeals. There is this difference, however, between them. The plaintiff in the court below was district attorney for the Northern District of California. The Court of Appeals was held at San Francisco, within the limits of that district, though the case in which he was employed and in which he rendered the services was one coming to that court from the District Court of Alaska.

In a geographical sense the services were rendered in a government case pending in the district for which he was district attorney, and technically, therefore, it may be said that those services were within the statutory designation of his duties. But we are of the opinion that this fact is not decisive, and for these reasons: At the time the sections defining his duties were enacted there was no Court of Appeals, and therefore no service in such court could have been within the contemplation of Congress in their enactment. Undoubtedly the fact that Congress thereafter added to his duties would not of itself change the measure or limits of compensation. But the question is whether a fair construction of the Court of Appeals act casts upon him any duties in respect to cases pending in that court. That act was a new and great departure in the judicial system of the United States. It divided the appellate jurisdiction theretofore vested in this court and distributed it between this and the newly created Courts of Appeal. To accommodate suitors it provided that the sessions of those courts should be held within their respective circuits, but for all practical purposes those courts became for several classes of cases practically the Supreme Court, and this notwithstanding the fact that there was reserved to this court a control over their proceedings. They were, as we held in the opinion just filed, in no sense courts in or for a district, but distinctively appellate courts for the entire circuit. No express provision was made for appearances in those courts by the district attorneys of the several districts, and the control

of cases in them comes within the general jurisdiction of the Attorney General as head of the Department of Justice.

While one city in each circuit was named as a place for holding at least one term of the court, authority was given to the judges to hold terms at other places within the circuit, and in fact in several circuits the Courts of Appeals are held at more than one place. Obviously great practical inconvenience would result if the management and control of a case pending in a Court of Appeal was adjudged the duty of the district attorney of the district in which the court is held. For if the case was placed on the docket for one term and the district attorney of the district in which that term was held should assume the management and control of the case, it might often be that before the case was reached for argument the court would have finished its term there and adjourned to a place in some other district, and then upon the district attorney of that district would rest the duty of undertaking the management and control. So not merely the nature of the court and its relations to the entire circuit, but the practical difficulties which would attend the matter concur in compelling the conclusion that it is not a part of the official duties of the district attorney of the district in which at the time a session of the Court of Appeals is held to assume the management and control of government cases in that court.

As we indicated in *United States* v. *Winston*, *ante*, 522, that court must stand in relation to cases pending therein, so far as concerns the legal representatives of the Government, precisely as this court, and the management and control of all cases therein must be regarded as a part of the immediate duties of the Department of Justice and under the control of the Attorney General. So, although the particular case in which this plaintiff was employed was pending in the Court of Appeals, whose sessions were then held within the territorial limits of his district, the duty of attending to the management of that case was not cast upon him, and when he was employed by the Attorney General to represent the Government in that case he was employed as a special counsel, and the rule of compensation must be the same as adjudged in the prior case.

Statement of the Case.

The same observations must be made here as in *United States* v. *Winston*, *ante*, 522, in reference to the matter of certificate, and the conclusions to which we came in that case find additional support from the fact that this case and the one immediately following (*United States* v. *Herron*, *ante*, 527) were tried in the Court of Claims, and both were decided during the same month. (31 Ct. Cl. 344–473). In that there was an express finding, as we have seen, that no certificate was given, as required by section 365, Revised Statutes, while in this such finding is omitted, and simply the general finding of an allowance by the Attorney General. We think, therefore, this comes within the rule laid down in *United States* v. *Winston*, *ante*, 522, and the judgment of the Court of Claims is

Affirmed.